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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE DISTRICT OF OREGON

11 DANNY ROMERO,)
12 Plaintiff,)
13 v.) No. CV-07-6083-HU
14 DR. VARGO, STEVE SHELTON,)
15 DAVID GRAFF, TED RANDALL, DR.) FINDINGS & RECOMMENDATION
16 BECKER,)
17 Defendants.)
18 Danny Romero
19 Oregon State Penitentiary
20 2605 State Street
21 Salem, Oregon 97310
22 Plaintiff Pro Se
23 John R. Kroger
24 ATTORNEY GENERAL
25 Joseph G. Groshong
26 ASSISTANT ATTORNEY GENERAL
27 Department of Justice
28 1162 Court Street NE
 Salem, Oregon 97301-4096
 Attorney for Defendants
 HUBEL, Magistrate Judge:
 Plaintiff Danny Romero, an inmate at Oregon State Penitentiary
 (OSP), brings this 42 U.S.C. § 1983 action against defendants Dr.

1 John M. Vargo, D.O., Oregon Department of Corrections Health
2 Services Administrator Steve Shelton, M.D., OSP Health Services
3 Manager Ted Randall, OSP Nurse Manager David Graff, and Dr. Jerry
4 Becker, M.D. Plaintiff contends that defendants violated the
5 Eighth Amendment by failing to properly treat his foot deformity.

6 Defendants move for summary judgment. I recommend that the
7 motion be granted in part and denied in part. Plaintiff moves for
8 appointment of an expert witness. I recommend that the motion be
9 granted.

10 BACKGROUND

11 Plaintiff suffers from two conditions that affect his left
12 foot. Becker Affid. at ¶ 4. One is a "Halux Valgus" deformity
13 which Dr. Becker explains causes plaintiff's large great toe to
14 turn to the outside of his foot, or splay. Id. The treatment, or
15 alleged lack thereof, for this condition is the basis of
16 plaintiff's lawsuit.¹

17 The medical records show that on March 4, 2004, Dr. Becker
18 examined plaintiff's foot. Attnmt 1 to Becker Affid. at p. 2. Dr.
19 Becker wrote in his March 4, 2004 progress note that the ideal
20 treatment for plaintiff would be a carbon fiber plate in his left
21 shoe with a metatarsal pad. Id. He added, however, that a stiff
22 sole pair of shoes with a metatarsal pad would "probably suffice."
23 Id. Dr. Becker requested that plaintiff be scheduled to return to
24

25 ¹ The other condition is arthritis in his left great toe,
26 which Dr. Becker states is not a severe condition. Id.
27 Plaintiff does not appear to challenge that assertion and
28 plaintiff's allegations and summary judgment materials are all
addressed to the shoes, insert, and pad prescribed by Dr. Becker
for the Halux Valgus condition, not the arthritis.

1 see him once he received the items ordered, to be sure they all
2 fit. Id. In a separate physician's order written on that date,
3 Dr. Becker prescribed a rigid sole shoe or any shoe with a carbon
4 fiber sole plate to limit the motion of the great toe of the left
5 foot. Pltf's Exh. 1. He also prescribed an independent metatarsal
6 pad for the left forefoot, for one year. Id.

7 Plaintiff sent kynes inquiring about the shoes on March 26,
8 2004, and March 29, 2004. Atmt 2 to Vargo Affid. at p. 43. On
9 May 22, 2004, plaintiff sent another kyte inquiring about the
10 status of the shoes. Atmt 1 to Becker Affid. at p. 3. On June
11 18, 2004, plaintiff received shoes from the prison canteen. Id.

12 On July 23, 2004, plaintiff sent a kye regarding the foot pad
13 ordered by Dr. Becker. Id. He was told that the Therapeutic Level
14 of Care (TLC) Committee had denied the foot pad and had recommended
15 work boots with hard soles. Id.; see also Atmt 2 to Vargo Affid.
16 at p. 83 (July 8, 2004 memorandum from Dr. Vargo noting that the
17 treatment proposed was a metatarsal pad and that the TLC
18 recommended work boots instead; no mention of carbon fiber insert).

19 Dr. Vargo states that he considered Dr. Becker's
20 recommendation, but based on his examination of plaintiff, Dr.
21 Vargo chose a more conservative approach and ordered work boots
22 with a hard sole. Vargo Affid. at ¶ 7; Pltf's Exh. 2 (showing July
23 15, 2004 order from Dr. Vargo for issuance of work boots with a
24 hard sole, for one year).

25 On August 9, 2004, plaintiff requested to see Dr. Becker
26 because his foot hurt in the hard sole shoes. Atmt 1 to Becker
27 Affid. at p. 4. Dr. Becker examined plaintiff on August 19, 2004,
28 and noted plaintiff's complaint that the current shoes were not

1 comfortable. *Id.* Dr. Becker described the shoes plaintiff was
 2 wearing as seamless soft leather toe box shoes with thick soles.
 3 *Id.* In the "prescription" section of his progress note, Dr. Becker
 4 states "see first order[,] needs metatarsal pad." *Id.* Dr. Becker
 5 also wrote a separate order on that date for the metatarsal pad and
 6 for New Balance extra-wide shoes for splay foot. *Id.* at p. 1. He
 7 noted that this was an indefinite order. *Id.*

8 On September 9, 2004, plaintiff sent a kytic inquiry about
 9 the shoes and metatarsal pad recommended by Dr. Becker. Attnmt 2 to
 10 Vargo Affid. at p. 47. He was told that he received the shoes in
 11 June 2004, and that the TLC Committee had denied the metatarsal
 12 pad. *Id.*

13 On October 26, 2004, plaintiff was given an "OK" to purchase
 14 wide shoes at the canteen. Attnmt 2 to Vargo Affid. at p. 13. On
 15 November 2, 2004, a second order requiring that he be issued work
 16 boots with hard soles for one year, was entered. *Id.* On November
 17 17, 2004, plaintiff sent a kytic regarding the order for shoes and
 18 boots. *Id.* at p. 48. In response, he was sent a copy of
 19 instructions to obtain a package authorization to have the
 20 shoes/boots sent in. *Id.*

21 On January 6, 2005, plaintiff sent a kytic requesting work
 22 boots. *Id.* at p. 49. He was told to obtain work boots through the
 23 clothing room. *Id.* On January 21, 2005, plaintiff signed an
 24 acknowledgment in which he states that he "willingly accept[s] this
 25 pair of Reebok I3 Phoenix Low shoes (size 9) fulfilling my medical
 26 need for shoes. The cost center has agreed to meet the payment
 27 cost." Pltf's Exh. 51.

28 On February 1, 2006, plaintiff sent a kytic requesting

1 authorization for shoes. Atmt 2 to Vargo Affid. at p. 59. He was
2 told that the order was now over one year old and he needed a new
3 order. Id. On February 8, 2006, Dr. Vargo examined plaintiff and
4 noted that plaintiff requested that Dr. Vargo write an order that
5 the Department of Corrections pay for plaintiff's shoes. Id. at p.
6 60. Dr. Vargo told him he could not write that order. Id. On
7 March 8, 2006, plaintiff sent a kytic asking when shoes would be
8 ordered for him. Id. The record shows that documents were sent to
9 Dr. Vargo for review. Id.

10 On May 3, 2006, plaintiff was examined by someone whose
11 signature is illegible and not identified. Id. at p. 61.
12 Plaintiff requested a metatarsal pad for his left foot. Id. The
13 practitioner indicated that follow up with Dr. Vargo would occur.
14 Id.

15 Plaintiff requested to see Dr. Becker on August 26, 2006.
16 Atmt 1 to Becker Affid. at p. 5. He complained of ongoing foot
17 pain. Id. Dr. Becker examined plaintiff on September 29, 2006.
18 Id. He ordered extra-wide shoes for splay feet, a long arch
19 support with metatarsal pad, and a carbon fiber plate to limit the
20 range of motion of the great toe. Id. at p. 6.

21 On October 23, 2006, plaintiff sent a kytic regarding the order
22 for the shoes and arch supports. Id. He was told that the TLC
23 Committee recommended that he get extra-wide shoes from the
24 clothing room, and arch supports from the canteen. Id.; see also
25 Atmt 2 to Vargo Affid. at p. 84 (Oct. 5, 2006 memorandum from Dr.
26 Vargo noting the proposed treatment of extra-wide shoes, long arch
27 support with "met pads" and carbon fiber plate to limit great toe
28 motion, and noting TLC Committee's recommendation that plaintiff

1 obtain extra wide shoes from clothing supply, purchase arch
2 supports from the canteen, lose weight, and take non-steroidal
3 anti-inflammatory medications (NSAIDs), if he had pain).

4 On January 11, 2007, plaintiff saw Dr. Becker for a different
5 complaint. Atmt 2 to Vargo Affid. at p. 66. In a separate order
6 on that date, Dr. Becker noted: "see 9-29-06 foot order for carbon
7 fiber plate & long arch support [with] met pad." Id. at p. 18.

8 On August 9, 2007, Dr. Becker saw plaintiff again and noted
9 that plaintiff reported that he was still waiting for shoe
10 modifications. Atmt 1 to Becker Affid. at p. 7. His current
11 shoes had worn out and his symptoms were unchanged. Id. Plaintiff
12 was given a metatarsal pad that day. Id. Dr. Becker noted that
13 plaintiff still needed extra-wide shoes and a carbon fiber insert,
14 or rigid sole to limit the great toe motion. Id. Dr. Becker
15 stated that a carbon fiber plate could be used in multiple shoes
16 and was recommended as a way to avoid a Keller bunionectomy. Id.
17 In a separate order on that date, Dr. Becker ordered extra-wide
18 shoe toe box with carbon fiber insole, and a metatarsal pad for
19 indefinite use. Pltf's Exh. 7, 8.

20 On August 28, 2007, plaintiff was told that his carbon fiber
21 shoe insert was approved. Atmt 1 to Becker Affid. at p. 8; see
22 also Atmt 2 to Vargo Affid. at p. 85 (Aug. 23, 2007 memorandum
23 from Dr. Vargo noting the proposed treatment of a carbon fiber
24 plate and noting the TLC Committee's approval if approved by
25 security). On September 6, 2007, he sent a kytic requesting copies
26 of Dr. Becker's medical notes and prescriptions for plaintiff's
27 foot problems. Id. at p. 111. Plaintiff also requested copies of
28 the TLC Committee's decision regarding Dr. Becker's orders. Id.

On January 7, 2008, plaintiff acknowledged receiving a custom made carbon fiber plate. Pltf's Exh. 213.

3 On March 3, 2008, plaintiff complained that he was unable to
4 purchase shoes to fit his carbon fiber insole and requested that
5 the Department of Corrections purchase shoes for him. Atmt 1 to
6 Becker Affid. at p. 9. Dr. Becker examined plaintiff on March 6,
7 2008, and noted that plaintiff's foot was too tight in the toe box
8 with the carbon fiber insert. *Id.* If he took out the insole, it
9 worked well for the toe pain, but he also needed the cushion. *Id.*
10 Dr. Becker ordered plaintiff to have shoes with an extra deep toe
11 box to accommodate the carbon fiber plate in order to avoid
12 surgery. *Id.*; see also Pltf's Exh. 9 (separate order dated March
13 6, 2008, ordering extra depth toe box shoe to accommodate carbon
14 fiber plate, and further ordering plaintiff be considered medically
15 idle or placed in sitting work until he received the extra depth
16 shoe).

17 On that same date, the TLC Committee rejected the purchase of
18 shoes to fit the carbon fiber insole and indicated that plaintiff
19 could obtain extra-wide shoes from the canteen. Attnmt 2 to Vargo
20 Affid. at p. 86. On May 13, 2008, plaintiff acknowledged receiving
21 a pair of Performance Walker orthopedic shoes, size 9W. Pltf's
22 Exh. 213. Plaintiff complains that these are too large for him.

STANDARDS

24 Summary judgment is appropriate if there is no genuine issue
25 of material fact and the moving party is entitled to judgment as a
26 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
27 initial responsibility of informing the court of the basis of its
28 motion, and identifying those portions of "pleadings, depositions,

1 answers to interrogatories, and admissions on file, together with
 2 the affidavits, if any,' which it believes demonstrate the absence
 3 of a genuine issue of material fact." Celotex Corp. v. Catrett,
 4 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

5 "If the moving party meets its initial burden of showing 'the
 6 absence of a material and triable issue of fact,' 'the burden then
 7 moves to the opposing party, who must present significant probative
 8 evidence tending to support its claim or defense.'" Intel Corp. v.
 9 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
 10 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
 11 Cir. 1987)). The nonmoving party must go beyond the pleadings and
 12 designate facts showing an issue for trial. Celotex, 477 U.S. at
 13 322-23.

14 The substantive law governing a claim determines whether a
 15 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
 16 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
 17 to the existence of a genuine issue of fact must be resolved
 18 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
 19 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
 20 drawn from the facts in the light most favorable to the nonmoving
 21 party. T.W. Elec. Serv., 809 F.2d at 630-31.

22 If the factual context makes the nonmoving party's claim as to
 23 the existence of a material issue of fact implausible, that party
 24 must come forward with more persuasive evidence to support his
 25 claim than would otherwise be necessary. Id.; In re Agricultural
 26 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
 27 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
 28 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

1 DISCUSSION
23 I. Eighth Amendment Standards
4

5 To succeed on a section 1983 claim for inadequate medical
6 treatment, plaintiff must demonstrate that defendants showed
7 "deliberate indifference to [his] serious medical needs[.]"
8 Estelle v. Gamble, 429 U.S. 97, 104 (1976); Lopez v. Smith, 203
9 F.3d 1122, 1131 (9th Cir. 2000). Plaintiff must show that he was
10 confined "under conditions posing a risk of objectively,
11 sufficiently serious harm and that the officials had a sufficiently
12 culpable state of mind in denying the proper medical care."
Clement v. Gomez, 298 F.3d 898, 904 (9th Cir. 2002) (internal
quotations omitted).

13 The analysis possesses two components: (1) an objective
14 inquiry whether the prisoner's medical condition is sufficiently
15 serious. See Wilson v. Seiter, 501 U.S. 294, 298 (1991); Toguchi
16 v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). Second, the
17 prisoner must demonstrate that subjectively, the prison official
18 acted with a culpable state of mind. Wilson, 501 U.S. at 298-99;
19 Toguchi, 391 F.3d at 1057.

20 Prison officials are deliberately indifferent to a prisoner's
21 serious medical needs when they deny, delay, or intentionally
22 interfere with medical treatment. Lopez, 203 F.3d at 1131.
23 Deliberate indifference is evidenced only when the official knows
24 of and disregards an excessive risk to inmate health or safety.
25 Clement, 298 F.3d at 904. "[A] serious medical need is present
26 whenever the failure to treat a prisoner's condition could result
27 in further significant injury or the unnecessary and wanton
28 infliction of pain[.]" Lolli v. County of Orange, 351 F.3d 410,

1 419 (9th Cir. 2003) (internal quotation omitted).

2 Mere negligence is insufficient for liability. Clement, 289
 3 F.3d at 904. Rather, the prisoner must show that the course of
 4 treatment undertaken was medically unacceptable under the
 5 circumstances, and that the defendants chose this course in
 6 conscious disregard of an excessive risk to plaintiff's health.
 7 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996). A
 8 difference of opinion does not establish deliberate indifference.
 9 Id.

10 II. Discussion

11 In the Amended Complaint, filed by plaintiff on July 12, 2007,
 12 plaintiff contends that Dr. Vargo has "deliberately and
 13 continuously" denied orders from Dr. Becker to have plaintiff's
 14 "medically recommended shoes [fitted] with [metatarsal] pads[.]"
 15 Am. Comp. at ¶ 4. Without the recommended shoes and pads,
 16 plaintiff experiences "imminent pain and disfigurement[.]" Id.
 17 Plaintiff further alleges that without the shoes and pads, he is
 18 damaged "for life[.]" Id. Plaintiff also alleges that Dr. Vargo
 19 and other defendants have deliberately denied him the recommended
 20 relief ordered by Dr. Becker of medically needed shoes. Id. at ¶
 21 6.

22 Plaintiff's allegations and his summary judgment briefing show
 23 that the basis of his Eighth Amendment deliberate indifference
 24 claim is the failure of Dr. Vargo to follow Dr. Becker's orders
 25 regarding certain shoes, a carbon fiber insert, and a metatarsal
 26 pad to alleviate plaintiff's foot pain and to avoid surgery.
 27 Defendants do not challenge that plaintiff's Halux Valgus deformity
 28 in his left foot is a serious medical condition. Thus, the

1 question in this case is whether defendants possess the requisite
2 culpable state of mind.

3 Initially, I recommend that defendants' motion be granted as
4 to all defendants other than Dr. Vargo. Plaintiff fails to create
5 an issue of fact regarding the personal participation by any of the
6 other defendants in denying him the treatment prescribed by Dr.
7 Becker.

8 As to Dr. Shelton, there is evidence of correspondence between
9 Dr. Shelton and plaintiff in which Dr. Shelton informs plaintiff of
10 various decisions made by OSP Health Services, the TLC Committee,
11 and the Medical Services Committee. Pltf's Exh. 108 (Apr. 23, 2007
12 letter from Dr. Shelton to plaintiff indicating that health
13 services was in the process of obtaining a carbon fiber plate and
14 long arch support for plaintiff); Pltf's Exh. 109 (June 13, 2007
15 letter from Dr. Shelton to plaintiff in response to plaintiff's May
16 30, 2007 kytic regarding shoes and arch supports and plaintiff's
17 need to purchase items from the clothing room and canteen); Pltf's
18 Exh. 110 (June 20, 2007 letter from Dr. Shelton to plaintiff in
19 response to plaintiff's June 15, 2007 kytic and informing plaintiff
20 that TLC Committee discussed his case including "carbon fiber arch
21 supports", and agreed that plaintiff could obtain adequate arch
22 supports from the canteen); Unnumbered Pltf's Exh. (July 30, 2008
23 letter from Dr. Shelton to plaintiff regarding Medical Services
24 Committee's decision to rescind authorization for carbon fiber
25 insert because there were other reasonable medical alternatives).

26 None of the correspondence reveals that Dr. Shelton himself
27 was involved in the actual decisions regarding the treatment
28 plaintiff was prescribed or received. Plaintiff fails to create an

1 issue of fact regarding Dr. Shelton's role in actually denying
2 plaintiff the medical treatment plaintiff complains about in this
3 case. Being a conduit for information is not enough.

4 As to Randall and Graf, there is no evidence of their
5 involvement in plaintiff's failure to receive the shoes/boots,
6 metatarsal pad, or carbon fiber insert. Graf responded to some of
7 plaintiff's grievances about footwear and arch supports by
8 reminding plaintiff of the TLC Committee's decisions and what had
9 previously been communicated to plaintiff. Pltf's Exh. 106.
10 Randall was copied on the correspondence to plaintiff by Dr.
11 Shelton. Pltf's Exhs. 108-110, and Pltf's Unnumbered Exh.
12 following Exh. 110. Other documents containing Randall's name are
13 after the date the Amended Complaint was filed and thus, are not
14 relevant to the events at issue in the Amended Complaint.
15 Notwithstanding the dates of those documents, however, they still
16 fail to show that Randall personally participated in decisions
17 regarding plaintiff's treatment. Pltf's Unnumbered Exh. (Jan. 17,
18 2007 grievance by plaintiff to OSP Superintendent Brian Belleque
19 which indicates it was referred to Randall); Pltf's Unnumbered Exh.
20 (Nov. 13, 2008 grievance by plaintiff to Dr. Shelton complaining
21 about a number of items and noting that Randall had not answered
22 plaintiff's kypes); Pltf's Unnumbered Exh. (Nov. 25, 2008 kype from
23 plaintiff to Randall about pain in toes and requesting
24 authorization from Randall for a friend "on the outside" to
25 purchase the stiff sole shoes plaintiff required; Randall responded
26 that this was "worth a try").

27 Finally, as to Dr. Becker, based on the allegations in the
28 Amended Complaint and the summary judgment materials submitted by

1 plaintiff, plaintiff's claim does not appear to be that Dr. Becker
2 failed in any way to prescribe what plaintiff believes to be
3 appropriate treatment. Instead, I understand plaintiff's claim to
4 be that Dr. Vargo refused to provide the treatment, in the forms of
5 shoes, metatarsal pad, and carbon fiber insert, that Dr. Becker
6 prescribed. Thus, I recommend that defendants' motion be granted
7 as to Dr. Becker, Dr. Shelton, Graf, and Randall.

8 My reading of the record shows that Dr. Becker, an orthopedic
9 physician, began his treatment of plaintiff in March 2004 by
10 prescribing one of two things: (1) a carbon fiber insert with
11 separate metatarsal pad, or (2) stiff or rigid sole shoes with
12 separate metatarsal pad. Dr. Becker recommended the former
13 treatment as ideal, but noted that the latter would "probably
14 suffice."

15 The record indicates that at times, OSP health staff may have
16 considered the carbon fiber insert, sometimes referred to as a
17 carbon fiber plate, as the same item as the metatarsal pad. But,
18 the physician orders make it clear that these were separate items.
19 E.g., Attmt 1 to Becker Affid. at p. 2 (Mar. 4, 2004 progress note
20 written by Dr. Becker stating "Rx is carbon fiber plate [left] shoe
21 with metatarsal pad" and alternatively "stiff sole pair shoes with
22 met pad"); Pltf's Exh. 1 (Dr. Becker's order dated March 4, 2004,
23 listing "rigid sole shoe or any shoe with carbon fiber sole plate"
24 separate from "metatarsal pad"); Attmt 1 to Becker Affid. at p. 5
25 (Sept. 29, 2006 order by Dr. Becker for "long arch support with
26 metatarsal pad," and "carbon fiber plate").

27 The metatarsal pad was prescribed initially by Dr. Becker on
28 March 4, 2004, and again by Dr. Becker on August 9, 2004. Dr.

1 Becker prescribed it a third time on September 29, 2006, this time
2 as part of an arch support, but still separate from the carbon
3 fiber plate. Plaintiff did not receive the metatarsal pad until
4 August 2007, a delay of more than three years.

5 Defendants contend that the provision of hard sole work boots
6 was adequate treatment for plaintiff's condition, and that he had
7 access to pain medication if needed.

8 In July 2004, plaintiff was told that the TLC Committee had
9 rejected the request for the metatarsal pad and recommended hard
10 sole work boots instead. The TLC Committee decision from July 8,
11 2004, shows that the proposed treatment was a metatarsal pad, but
12 that work boots had been recommended instead. There is no mention
13 in the TLC Committee's memorandum of the carbon fiber insert or the
14 prescription for stiff or rigid sole shoes.

15 Plaintiff received shoes on June 18, 2004, perhaps the stiff
16 sole shoes recommended by Dr. Becker, although the record is not
17 entirely clear. In an August 9, 2004 progress note, Dr. Becker
18 described the shoes plaintiff was wearing as seamless soft leather
19 toe box shoes with thick soles. This suggests that the shoes
20 plaintiff received in June may have been the stiff or rigid sole
21 shoes recommended by Dr. Becker. In response to plaintiff's
22 complaint that these shoes hurt plaintiff's feet, Dr. Becker
23 ordered New Balance extra-wide shoes.

24 The record is unclear if plaintiff ever received the work
25 boots ordered by the TLC Committee², and even if he did, he did not
26

27 ² I find nothing in the summary judgment record to show
when, if ever, plaintiff received the hard sole work boots
28 ordered by the TLC Committee/Dr. Vargo in July 2004, and ordered

1 receive the metatarsal pad with them. In September 2004, he
2 inquired about the shoes and metatarsal pad Dr. Becker ordered. He
3 was told that he had received the shoes in June, and that the TLC
4 Committee had already denied the metatarsal pad. But, the shoes he
5 received in June 2004 were not the New Balance shoes that Dr.
6 Becker ordered in August 2004. The record does not show that
7 plaintiff ever received those shoes. Instead, plaintiff was given
8 an "OK" to purchase "wide" shoes at the canteen. A second order
9 for work boots with hard soles was issued in November. In January
10 2005, he was told to obtain work boots through the clothing room.
11 Later in January, he acknowledged receipt of Reebok shoes which he
12 "willingly accepted" and stated fulfilled his medical need for
13 shoes.

14 It is unclear if the Reebok shoes were a substitute for the
15 New Balance shoes ordered in August by Dr. Becker. And, at this
16 point, the record does not show that plaintiff ever received the
17 hard sole work boots. Additionally, although plaintiff signed the
18 acknowledgment that the Reebok shoes "fulfilled" his medical need
19 for shoes, plaintiff still had not received a metatarsal pad. He
20 continued to receive orders for it in 2006 and in early 2007, but
21 he did not receive it until August 2007. In September 2006, he was
22 told he could obtain the prescribed long arch support with
23 metatarsal pad through the canteen, but the canteen does not carry

24 again in November 2004. However, in support of his motion for
25 appointment of expert podiatrist, plaintiff states that he
26 obtained a "non-modified institution work boot" from the prison
27 clothing room. Mtn for Appt. of Expert Wit Podiatrist (#64). He
28 does not indicate when he received the work boots and he further
states that the work boots caused a "great deal of discomfort and
pain" and caused problems when walking.

1 metatarsal pads. Pltf's Unnumbered Exh. (Oct. 31, 2008 kytic to
2 canteen from plaintiff requesting metatarsal pad with response
3 stating that canteen does not sell "anything like that").

4 In his affidavit, Dr. Becker states that the fact that he
5 "recommended a carbon fiber metatarsal pad and instead hard sole
6 work boots were ordered, is not medically significant because hard
7 soled work books is one of the recommended courses of treatment for
8 Mr. Romero's condition." Becker Affid. at ¶ 15. Dr. Vargo states
9 that "proper fitting shoes like hard soled work boots will give
10 relief." Vargo Affid. at ¶ 7.

11 The problem with Dr. Becker's statement is that the record
12 does not support his description of having recommended a "carbon
13 fiber metatarsal pad." As discussed above, the medical record
14 shows that Dr. Becker ordered a carbon fiber insert or stiff/rigid
15 sole shoes, and a metatarsal pad. The record shows that plaintiff
16 was prescribed a carbon fiber insert and separate metatarsal pad,
17 or stiff/rigid sole shoes and separate metatarsal pad. Even after
18 plaintiff obtained the metatarsal pad in August 2007, Dr. Becker
19 continued to prescribe a separate carbon fiber plate.

20 The record does not support equating the carbon fiber insert
21 and metatarsal pad. Thus, Dr. Becker's suggestion that
22 substituting the hard sole work boots without metatarsal pad, for
23 the carbon fiber insert with metatarsal pad, was acceptable medical
24 treatment for plaintiff's condition, is belied by his own medical
25 records and plaintiff's medical record generally. At a minimum, a
26 question of fact is raised.

27 Additionally, Dr. Vargo states that plaintiff has received a
28 variety of prescription pain medications since 2001 that relieve

1 arthritic discomfort in addition to the symptoms they were
2 prescribed to treat. Vargo Affid. at ¶ 13. Dr. Vargo suggests
3 that access to these medications, combined with the provision of
4 hard sole work boots, was sufficient medical treatment for
5 plaintiff's condition. The problem with this argument, however, is
6 that Dr. Becker did not prescribe these medications for plaintiff's
7 foot deformity and the basis of plaintiff's claim is not a failure
8 to provide pain medications for other conditions. Defendants may
9 not absolve themselves of their constitutional duty to treat a
10 serious medical condition by suggesting that medication prescribed
11 for a separate condition suffices.

12 Defendants argue that plaintiff offers nothing other than his
13 own opinion to contest defendants' position that the treatment he
14 received was acceptable treatment for his condition, even though it
15 was not the treatment plaintiff preferred. And, defendants note,
16 even if plaintiff had an opinion from a physician on this issue, a
17 difference of opinion does not support an Eighth Amendment
18 deliberate indifference claim.

19 Defendants, however, fail to establish an absence of material
20 fact on the question of deliberate indifference on this summary
21 judgment record. The failure to provide the metatarsal pad for
22 more than three years by itself raises questions about whether Dr.
23 Vargo knew of and disregarded an excessive risk to plaintiff's
24 health. The fact that different types of shoes and boots were
25 ordered and not provided for several months or perhaps not at all,
26 raises questions about whether the treatment undertaken by Dr.
27 Vargo, in contrast to what Dr. Becker ordered, was medically
28 unacceptable under the circumstances. As such, on this record, Dr.

1 Vargo fails to establish in the first instance an absence of
2 material fact entitling Dr. Vargo to summary judgment.

3 Finally, plaintiff has separately moved for the appointment of
4 an expert witness podiatrist. Federal Rule of Evidence 706 allows
5 the court to appoint an expert witness on its own or on a party's
6 motion. The court may exercise its discretion in favor of the
7 appointment of an expert witness to assist the court in evaluating
8 complex or confusing evidence. Walker v. American Home Shield Long
9 Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999); McKinney
10 v. Anderson, 924 F.2d 1500, 1510 (9th Cir.), vacated on other
11 grounds sub nom., Helling v. McKinney, 502 U.S. 903 (1991).

12 While the evidence in this case is not complex, I recommend
13 that the court exercise its discretion in favor of appointing an
14 expert podiatrist. Here, one Department of Corrections physician,
15 Dr. Vargo, ordered treatment different from that prescribed by a
16 specialist Department of Corrections physician, Dr. Becker.
17 Although Dr. Becker's affidavit suggests that the treatment ordered
18 by Dr. Vargo was medically acceptable, Dr. Becker's affidavit is
19 undermined by his own medical records. Considering that the
20 Department of Corrections physicians themselves appear to have
21 disagreed on the proper course of treatment and that defendants'
22 primary argument in support of summary judgment is that plaintiff
23 has no evidence other than his own opinion that the treatment
24 defendants provided him was not acceptable, appointment of an
25 expert will assist the court at trial in resolving the claim.

26 CONCLUSION

27 I recommend that defendants' motion for summary judgment (#55)
28 be granted as to Dr. Becker, Dr. Shelton, Graff, and Randall, and

1 denied as to Dr. Vargo. I recommend that plaintiff's motion for
2 appointment of expert podiatrist (#64) be granted.

3 SCHEDULING ORDER

4 The above Findings and Recommendation will be referred to a
5 United States District Judge for review. Objections, if any, are
6 due July 10, 2009. If no objections are filed, review of the
7 Findings and Recommendation will go under advisement on that date.

8 If objections are filed, a response to the objections is due
9 July 24, 2009, and the review of the Findings and Recommendation
10 will go under advisement on that date.

11 IT IS SO ORDERED.

12 Dated this 25th day of June, 2009.

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15 /s/ Dennis James Hubel
16 Dennis James Hubel
United States Magistrate Judge
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